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ABSTRACT

This paper presents an outline and analysis of court decisions and federal legislation concerning required educational services for students with disabilities who are expelled from school for conduct judged to be unrelated to the disability. The analysis focuses on documentation of the right to continued education following disciplinary expulsion and content requirements of education after such an expulsion. The issue is interpreted in terms of the following court cases and federal laws: Honig v. Doe, the Individuals with Disabilities Education Act (IDEA), Commonwealth of Virginia v. Riley, S-1 v. Turlington, Kaelin v. Grubbs, and Bd. of Hendrick Hudson Central School District v. Rowley. (DB)

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ED 405 704

POINTS ON THE CONTENT OF EDUCATION AFTER "EXPULSION" FOR CONDUCT DEEMED UNRELATED TO A DISABILITY

Eileen L. Ordover
September 1996

Introduction

In *Honig v. Doe*,[1] the Supreme Court held that any exclusion of a child from his or her current educational placement for more than ten days constitutes a change of placement for purposes of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, triggering change of placement procedures under that statute. Rejecting an attempt to read into the statute an exception to the stay-put provision[2] for students school officials deem dangerous or disruptive, the Court also held that it was not free to create exceptions to procedural safeguards that Congress itself chose not to make.

IDEA change in placement procedures include the requirements that a decision to change a child's placement be based upon full consideration of the child's needs, with parental participation, by a team of qualified persons knowledgeable about the student's needs, the meaning of the evaluation data, the current placement and program, and placement options.[3] Consistent with these requirements and *Honig*, it is highly dubious that, under current law, *any* child with disabilities -- regardless of whether "misconduct" is related to disability -- can be suspended for more than 10 days or "expelled" from school, if "suspension" or "expulsion" means a decision by school disciplinarians (e.g. school board,

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[1] 484 U.S. 305, 108 S.Ct. 592 (1988).

[2] 20 U.S.C. §1415(e)(3).

[3] 20 U.S.C. §1401(a)(18), (20); 34 C.F.R. §§300.344-.45, 300.533. *See also Honig*, 484 U.S. at 326, 108 S.Ct. at 605 (noting that where a student is behaving dangerously, school "officials can initiate an IEP review and seek to persuade the child's parents to agree to an interim placement").

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superintendent, principal, non-IDEA hearing officer) to bar a child from a particular classroom, school or school system.

A number of pre-*Honig* cases stated that IDEA permits long-term suspension or "expulsion" upon a "proper" determination that the child's conduct is not related to a disability,[4] and the U.S. Department of Education/Office of Special Education Programs (OSEP) maintains this erroneous position post-*Honig*.[5] However, as did two pre-*Honig* Courts of Appeal, OSEP has taken the position that IDEA entitles these "expelled" students to continued educational services.

Contrary to IDEA requirements, school systems routinely provide woefully inadequate services to students who have not been able to demonstrate that the behavior for which they have been disciplined is disability-related. The IDEA entitlement to a "free appropriate public education" in the least restrictive environment, however, should preclude in most instances practices such as relegating students to home tutoring and limiting education to discrete special education services.

Advocates should be aware that, as noted below, students residing in at least the Fifth and Eleventh Circuits should be deemed to have a right under Section 504 of the Rehabilitation Act, 29 U.S.C. §794, to continued services after expulsion for unrelated conduct.

A. The Right to Continued Education

1. IDEA requires states and local school systems to provide a "free appropriate public education" to "all" children with disabilities in their jurisdictions. 20 U.S.C. §§1412(1), (2)(B),(C), 1414(a). There is no statutory exception for children who have not been able to demonstrate that the behavior for which they have been disciplined is disability-related. *Commonwealth of Virginia, Department of Education v. Riley*, 86 F.3d 1337, 1343-44 (4th Cir. 1996). Courts may not engraft onto IDEA exceptions Congress chose not to make. *Honig*, 484 U.S. at 325, 108 S.Ct. at 604-05; *Commonwealth of Virginia*, 86 F.3d at 1344-45.

2. The legislative history of what has become IDEA reveals that the exclusion from education of children labelled behavior problems was a major impetus behind enactment

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[4] *E.g.*, *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982); *School Bd. of Prince William County v. Malone*, 762 F.2d 1210 (4th Cir. 1985); *Doe v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986), *aff'd. as modified sub nom, Honig v. Doe*, 484 U.S. 305 (1988).

[5] *See e.g.*, Judith E. Huemann, Assistant Secretary, OSEP Memorandum 95-16, April 26, 1995, published at 22 IDELR [Individuals with Disabilities Education Law Report] 531.

of the law. See, e.g., *Honig*, 108 S.Ct. at 596-97, discussing legislative history. See also 20 U.S.C. §1400(b)(1) - (9), setting forth Congressional findings underlying IDEA.

3. Pre-*Honig* decisions stating that "expulsion" is permissible under IDEA for conduct unrelated to a disability nonetheless prohibited cessation of educational services. *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982). *But see Doe v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986), *aff'd. as modified sub nom, Honig v. Doe*, 484 U.S. 305 (1988).

4. OSEP policy interpretations of IDEA hold that states and school systems must provide a "free appropriate public education" to students "properly expelled" for conduct unrelated to their disabilities. *See, e.g., Response to Inquiry of New*, EHLR [Education of the Handicapped Law Reports] 213:258 (OSEP 9/15/89);*Response to Inquiry of Smith*, 18 IDELR [Individuals with Disabilities Education Law Reports] 685 (OSEP 1/31/92); *Response to Inquiry of Hartman*, 23 IDELR 894 (OSEP 10/19/95); OSEP Memo 95-16, *supra*. OSEP maintains that this rule applies in the Ninth Circuit despite *Doe v. Maher*, on the ground that the statements in that opinion permitting cessation of services are dicta. *Response to Inquiry of Davis*, 16 EHLR 734 (OSEP 12/22/89); *Response to Inquiry of Feinstein*, 21 IDELR 1134 (12/16/94).

5. In an enforcement proceeding against the state of Virginia, the U.S. Secretary of Education in 1995 issued a decision withholding future IDEA funding due to the state's refusal to agree to educate children expelled for unrelated conduct. *Virginia Department of Education*, Case No. 94-76-0, 22 IDELR 908 (7/3/95), affirming as modified the hearing officer decision reported at 22 IDELR (U.S. Dept. of Ed. Office of Hearings and Appeals 4/6/95). The U.S. Court of Appeals for the Fourth Circuit affirmed the Secretary's decision on June 19, 1995, holding that IDEA s "plain" and "unqualified" language requiring states to provide a free appropriate public education to *all* children with disabilities includes this group. *Commonwealth of Virginia, supra*, 86 F.3d at 1343-44. The court explained, "[j]ust as the Court in *Honig* refused to read a "dangerousness" exception into the Act's stay-put provision, we refuse to read a 'suspension or expulsion for conduct unrelated to disability' exception into the Act's requirement that 'all' disabled children be assured 'the right to a free appropriate public education.'" 86 F.3d at 1345.[6]

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[6] In what may be the only such decision, a federal court, citing *Doe v. Maher*, recently held that schools *may* terminate educational services to children expelled for unrelated conduct. The court reversed itself on reconsideration, explicitly deferring to OSEP's position on the matter. See *Doe v. Bd. of Ed. of Oak Park*, 23 IDELR 871 (N.D. Ill. 2/15/96), *reconsideration granted*, 23 IDELR 1141 (4/19/96). The court subsequently reversed itself once again, holding, with virtually no analysis and no mention of the recent Fourth Circuit decision in the Virginia case, that OSEP's interpretation is based on "an erroneous extension of...*Honig v. Doe*." *Doe v. Bd. of Ed. of Oak Park*, 24 IDELR 385 (7/10/96).

6. Students in at least the Fifth and Eleventh Circuits should be deemed to have a right under section 504 of the Rehabilitation Act to continued educational services after expulsion for unrelated conduct. In *S-1*, the Fifth Circuit explained, "[w]e...find that expulsion is still a proper disciplinary tool under the EHA and section 504 when proper procedures are utilized and under proper circumstances. We cannot, however, authorize complete cessation of educational services during an expulsion period." 635 F.2d at 348. Cessation is thus prohibited as a §504 matter as well as an IDEA (then the EHA) matter. The U.S. Department of Education/Office for Civil Rights recognized as much when it warned in a 1988 memorandum that while OCR construed §504 to permit exclusion from education as a disciplinary measure for unrelated conduct, this policy should not be applied in Alabama, Georgia, Florida, Texas, Louisiana and Mississippi. *See* LeGree S. Daniels, Assistant Secretary for Civil Rights, Memorandum to OCR Senior Staff, October 28, 1988 at fn. 2, published at EHLR 307:05.[7]

B. The Content of Education After "Expulsion"

1. The *S-1* and *Kaelin* courts prohibited what they termed "cessation" of "educational services" without analysis, and without speaking to the content of post-expulsion education. As the Fourth Circuit recognized in *Commonwealth of Virginia*, however, the underlying IDEA entitlement is to a "free appropriate public education," and this is the basis of schools' legal obligation to continue educating all students. *Commonwealth of Virginia*, 86 F.3d at 13444. See also *Virginia Department of Education*, *supra*, and OSEP letters cited in ¶ A(4), above.

2. Under IDEA, "free appropriate public education" means "special education and related services that (A) have been provided at public expense, under public supervision and direction, without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary or secondary education in the State involved, and (D) are provided in conformity with the individualized education program..." 20 U.S.C. §1401(a)(18).

a. Post-"expulsion" education thus must include "an appropriate elementary or secondary education in the state involved." Education limited to the special education supports (e.g. three hours per week of assistance in math related to a learning disability) and/or related services listed on a child's pre-expulsion IEP does not meet this standard. Homebound instruction, particularly the time- and subject matter-limited variety routinely provided in many school systems, will rarely meet this

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[7] Decisions of the Fifth Circuit handed down prior to October 1, 1981, as was *S-1*, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

standard either.[8]

b. A "free appropriate public education" must be specially designed to meet a child's unique needs. 20 U.S.C. §§1401(a)(18), (16). As OSEP has recognized, there is no exception to this requirement for students deemed to have committed disciplinary infractions unrelated to their disabilities. *See* OSEP Memo 95-16, *supra*, at Question 8 ("[d]uring the period of disciplinary exclusion...each disabled student must continue to be offered a program of appropriate educational services that is individually designed to meet his or her unique learning needs"); *Response to Anonymous Inquiry*, 23 IDELR 989 (OSEP 8/4/95) (if parent disagrees with the appropriateness of the educational services offered student expelled for unrelated conduct, parent may request IDEA due process hearing). In most cases, advocates, with the assistance of evaluations and appropriate experts, should be able to demonstrate that home tutoring or other limited instruction does not meet their client's unique educational needs. In addition, where a school has a policy or practice of placing all children expelled for unrelated conduct on homebound instruction, or in some other single placement, placement decisions clearly are not being made on an individualized basis, as required by the statute.

3. IDEA prohibits the use of special classes, separate schooling, or other removal of children with disabilities from the regular education environment unless the nature or severity of a child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §1412(5)(B). The statute makes no exception for children who have not been able to demonstrate that the behavior for which they have been disciplined is disability-related. As noted in ¶ A(1), above, *Honig* supports the argument that courts and schools may not create one. *See also Honig*, 484 U.S. at 320-21, 108 S.Ct. at 603 (efforts to control student's behavior "must be tempered by the school system's statutory obligations to provide...a free appropriate public education in 'the least restrictive environment'...[and] to educate him 'to the maximum extent appropriate' with children who are not disabled...."); *Response to Inquiry of Uhler*, 18 IDELR 1238, 1239 (OSEP 5/14/92) (alternative placements proposed by school systems to control student conduct must be tempered by the obligation to provide FAPE in the least

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[8] Most states and many local school systems have adopted minimum requirements regarding the length of the school day, the content of curricula and the amount of time during the day that must be devoted to academic instruction. These requirements define in part "an appropriate elementary or secondary education in the state involved," 20 U.S.C. §1401(a)(18)(C), and (to the extent adopted or approved by the state) are "standards of the State educational agency" that must be met pursuant to 20 U.S.C. §1401(a)(18)(B). Home tutoring may be challenged as failing to provide a "free appropriate public education" on these bases as well.

restrictive environment) (citing *Honig*).[9]

4. Least restrictive environment requirements may be conceived of as procedural ones as well as substantive ones and, therefore, as a mandatory component of the "free appropriate public education" to which students expelled for unrelated conduct remain entitled.

a. Under IDEA, a child's education and placement must be procedurally appropriate, i.e. developed in accordance with IDEA procedural requirements, as well as substantively appropriate in order to be deemed a "free appropriate public education." *Bd. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982).

b. Consideration, by a group of persons knowledgeable about the child, the meaning of the evaluation data, and placement options, of the extent (if any) to which a child ought to be removed from the regular education setting under the terms of 20 U.S.C. §1412(5)(B), is a required procedural step in decision-making under IDEA. *See* 34 C.F.R. §§300.533(a), 300.550, 300.552(d). Furthermore, "before the school district may conclude that a handicapped child should be educated outside the regular classroom, it must consider...the whole range of supplemental aids and services for which it is obligated...to make provision," and consideration of these issues must occur "prior to and during the development of the IEP." *Greer v. Rome City School District*, 950 F.2d 688, 696 (11th Cir. 1991), *opinion withdrawn*, 956 F.2d 1025), *reinstated*, 967 F.2d 470 (1992). Placement in homebound instruction or in other unduly restrictive settings in violation of these procedures should be deemed procedurally inappropriate and thus a violation of the obligation to provide a free appropriate public education under *Rowley*.

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[9] The restrictiveness of home tutoring or other restrictive placements may be challenged, in the alternative, as a matter of "appropriateness" by making the case that particular features of the less restrictive setting are key to meeting a students unique individual educational needs. E.g., a student might need to be around peers in order to develop language skills.